



Determination
Acquisition of Home Gas Ltd by Foster Group Holdings Limited



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Distribution: Draft to Home Gas Limited and Parties likely to be impacted by the acquisition. Final determination public document

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1. The Utility Regulation and Competition Office (“OfReg” or “the Office”) presents its draft determination following its review and analysis of the application and supporting document supplied by the parties to the transaction for the sale and change of control of Home Gas Ltd.
2. On 28 March 2022, through their attorneys Appleby Cayman Ltd, an application was received by the Office which sets out the transaction involving Bodden Holding Ltd. (BHL), Home Gas Ltd. (HGL) and Foster Group Holdings Ltd. (FGHL), as the Seller, the Company and the Purchaser respectively. The Company is a licensee (Authorisation Holder) of OfReg in the Propane relevant market of the Fuel Sector, and is part of the Seller’s portfolio of companies operating in the Cayman Islands. The Seller has decided to divest the Company for reasons outlined in its application which are acceptable to the Office. The Purchaser is not a licensee of OfReg, but its affiliated companies hold Operating Permits to operate fuel tanks to supply emergency generators at their regulated premises. Both the Seller and Purchaser are locally owned, operated and controlled companies.
3. In accordance with the provisions of Part 8 of the Utility Regulation and Competition Act (as revised) (‘URCA’), the Office upon receipt of a request for consent to the transfer shares of a Licensee, shall not “unreasonably” withhold its consent, and “the Office shall reply in writing to such request within thirty days of the receipt of the request.” The Office’s assessment sought to establish among other things, that there is no lessening of competition, considering that the Company holds significant market power. Additionally, the extent of the review carried out by the Office did not indicate that the prohibitions of s.66 and s.70 of the URCA would be violated.
4. During the preliminary review, there were no significant concerns noted by the Office in relation to the transaction, however the concerns outlined in the following paragraph were flagged by the Office for further review. This was necessary to ensure that a full review, as required by statute, was conducted, and pursuant to s.54(3) of the URCA, the Seller’s attorney was notified on 27 April 2022, that the Office will continue to review the matter and will require additional time to conclude and issue our determination, and that the extension sought, will not exceed the ninety days allowed under the URCA.
5. The areas for which further review were necessary were as follows:
 - a) Potential bundling of services post-transaction, which may be initially beneficial to consumers, but can be detrimental to competition in the market in the long term;

- b) The advantage HGL would have under the new owners, given the purchaser's access and ownership of strategic facilities and locations under the Foster Group of companies;
 - c) Cross subsidisation and the imminent introduction of regulatory accounts; and
 - d) Post-transaction loss of market (volumes) HGL's competitor will face, given the competitor's existing supply arrangement with the Purchaser.
6. The Office has reviewed the responses received and is satisfied that there are no materials reasons to disapprove the transaction, on the basis that the Purchaser will continue to operate the company with no changes to the operational, management and customer relations program and arrangement in place, and the Office has determined that any **future changes shall be subject to notification and approval by the Office.**
7. The Office has provisionally determined that it shall grant approval for the sale, allowing the Seller to transfer ownership and change of control via 100% share sale of the Company to the Purchaser.

Description of the Parties

The Company – Home Gas Ltd. is a propane distribution company operating across the three Islands of the Cayman Islands. It is an ordinary resident company incorporated under the laws of the Cayman Islands with the registered number 7666, whose registered office is at Bodden Corporate Services Ltd, PO Box 10335, Governors Square, 23 Lime Tree Bay Avenue, Grand Cayman, KY1-1003, Cayman Islands;

Bodden Holding Ltd. is an ordinary resident company incorporated under the laws of the Cayman Islands with the registered number 312180, whose registered office is at Wardour Management Services, PO Box 10147, Grand Pavilion, Alexander Way, Cayman Islands;

Fosters Group Holding Ltd. is an ordinary resident company incorporated under the laws of the Cayman Islands with the registered number 187310 of PO Box 1040, Grand Cayman, KY1-1004, George Town, Cayman Islands.

Economic Regulatory and Competition Analysis

8. The Company is the holder of the Significant Market Power (SMP) in the Liquefied Petroleum Gas (LPG or 'Propane') market as deemed under the Fuel Market Regulation Act, 2017 (FMRA) and this was reconfirmed under the

comprehensive Market Definition and Economic Assessment (Market Assessment) exercise completed in 2021.

9. The Propane Market is served by only two undertakings and the Office's analysis considered how the change in control could potentially impact active competition in the market and measures which should be contemplated to preserve competition as a whole in this market segment.
10. Due to the confidential and commercially sensitive business information which were examined as part of the analysis, details of the review are not included here, and will not negatively impact or inhibit the ability of persons who can be affected by this transaction, to provide comment or concerns on potential area which they may have concerns.
11. The key recommendations contained in the Market Assessment Report relating to the propane relevant market will not be impacted by this transaction. The Office will continue to give full consideration to those recommendations going forward.
12. Based on the preliminary review of the competition effects which are usually grouped into vertical effects, horizontal effects and conglomerate effects, that may result in the substantial lessening of competition ("SLC").
13. Horizontal effects
 - a. Horizontal effects essentially take place where the merging parties sell products (or services) that were competing pre-merger, where products are viewed by consumers as being substitutes, that is, if the price of one product increases, consumers may be incentivized to switch to a competing product. A merger between competing parties may remove competition, in a way that permits increases in the prices of the products.
 - b. According to the information presented to the Office, FGHL do not appear to have any horizontal relationship with HGL and Clean Gas Limited (CGL) in any conceivable relevant market, as they provide no competing products of any kind, meaning, FHGL does not sell propane or any other products that HGL sells and vice versa. Additionally, no person or entity that has interest in FGHL also has an interest in any current or potential provider of propane
 - c. Since there is no apparent horizontal relationship between HGL, CGL and FGHL, horizontal effects may not possible, which can be concluded with a high degree of confidence.

14. Vertical effects

- a. Vertical effects essentially take place where the merging parties sell products (or services) that are in a vertical upstream-downstream relationship. There is therefore no direct loss of competition in the same market as there is in some horizontal mergers, however there may be vertical mechanisms of competition harm in the form of “foreclosure” mechanisms which may also result in SLC.
- b. In the case of FHGL’s vertical influence on the propane market, there may be “customer foreclosure,” as supermarket forecourts are an important potential path to the customer for both HGL and CGL. Loss of access by a provider to this important pathway may result in the loss of many sales and consequently being forced from the market or remain in the market but at a materially lower scale and thereby less able to price competitively.
- c. To manage this potential risk the Office considered obtaining a commitment from FHGL, that it will not remove this channel for CGL to access its customers.

15. Conglomerate effects

- a. Conglomerate effects involve products that are complements in consumption, where consumers typically consume them together (for example toothpaste and toothbrushes). This may manifest in tying or bundled discounts, where products are offered as a package for lower prices than when they are sold separately. In most cases bundled discounts are good for consumers and cause no competition harm, however circumstances may arise where they can cause competition harm and ultimately harm to the consumer.
- b. A scenario of potential concern is where a provider offers multiple products (or services), for example, products A and B and with market power in B competes against a provider only offering one of these products, let’s say A, and uses tying or discounting strategies to make it difficult for the single-product provider of product A to compete effectively or at all in that market. This eventually forces the competitor from the market for product A, and then subsequently exploits that enhanced market position by increasing prices, with consequent consumer harm.
- c. To manage this potential risk the Office considered obtaining a commitment from FHGL, that it will not in the future introduce tying or bundled discount arrangements without first demonstrating to the Office that any proposed arrangements are not anti-competitive.

16. The assessment referred to in paragraph 10 followed the Analysis Outline shown in Appendix 1.

Legal Analysis

Dangerous Substances Act (as revised) and Dangerous Substances Regulations (as revised)

17. The Company is permitted under the Dangerous Substances Act and holds valid permits (Authorisations) to import, store, handle and transport dangerous substances, in all three Islands. There are ongoing operational and competition related matters between the Company and its competitor(s), but these are not consequential to the current transaction. The entities will continue to address these issues after the transaction, with intervention from the Office as required based on the Office's remit in the sector.
18. Safety and compliance issues are addressed as they arise to ensure the safeguarding of public safety, noting the Office is empowered to take any enforcement action, consistent with the law, to ensure compliance.

Fuel Market Regulation Act, 2017

19. The Company is generally in compliance with the requirement of the Fuel Market Regulation Act (FMRA). There are a number of provisions for which Regulations and policy directions are pending, however, to advance the review and assessment of the application for consent and change of control, the Office requested and obtained the necessary information from the parties to the transaction.
20. With the pending enactment of new Regulation and Cabinet policy directives, the Company will be required to supply key information on a timelier basis, most of which will be set out and stipulated as license conditions under the license framework currently in the drafting process. One key requirement under the FMRA which is pending implementation is the Registration (License) Fee for which all importers will be required to pay.
21. In accordance with subsection 5(1)(b), the purchaser will be required to adhered to the strict requirement of the office in promoting fair and efficient competition in the fuel sector and market.

Utility Regulation and Competition Act (as revised)

22. The URCA is the primary legislation which governs the work of the Office in the sectors it regulates, and the key sections with which the Company and the transaction must comply and satisfy are set out below, summarized under the various parts of the URCA:

Part 7 – Significant Market Power

23. The Company is a significant market power (SMP) holder. The SMP guidelines established by the Office¹ applies to the Company and has been referred to previously in order to assess the Company's conduct in relation to competition concerns. The Office has imposed conditions on the Company in relation to equipment ownership and swapping of customers. Other conditions and measure relating to the Company's SMP position in the market are pending to be included in their Authorisation.
24. The Office continues to monitor and assess potential abuse of dominance and has draft guidelines in place to guide any decision the Office may wish to take in relation to dominance abuse.

Part 8 – Merger Control

25. In order to facilitate the review by the Office under this part, relevant information was sought from the Purchaser and the Company and both parties have fully complied with the requirements of this process.
26. The Office, when determining whether to give its consent, took into account the promotion of sustainable competition in the LPG market and the actual or potential competition from undertakings located either within or outside the Islands. Also considered was the market position of the Company concerned. This included the Company's economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.
27. As a part of its review, the Office referred to its Market Definition and Market Assessment Reports as stated above.
28. The Office has completed its screening phase, and has determined that an in-depth investigation was not required.
29. The Office will consider further/additional input received by the Office at the conclusion of the statutory consultation process.

Part 9 – Consumer Protection

¹ Guidelines on the Criteria for the Definition of Relevant Markets and the Assessment of Significant Market Power

30. Consumer protection is a key pillar the Office's regulatory role in the sectors it regulates, and all entities shall have a system in place for customer relations management. The Company currently has sales/customer service representatives and management in place to satisfy this area and is fully aware, and has participated in the past in the customer complaints appeal process to resolve matters relating to consumers.
31. This area will be further strengthened with the adoption of the Proposed Consumer Protection Regulation which is anticipated to be enacted during Q3 2022. There will also be obligations to which the Company must comply under their Authorisation.

Part 11 – Promotion of Economic Development

32. The Office took into consideration that the Company and the current transaction are not at odds with the National Energy Policy, and the Company in the past has actively sought avenues and alternatives to promote increased use propane to enhance the territory's economic and environmental footprint. It is anticipated the push for increased propane use as an avenue for improved consumers and the socioeconomic wellbeing of the nation will continue to be pursued.
33. The Office acknowledges the Company's active participation in the solicitation of fuel for power generation in the past which would have resulted in more stable and less costly energy costs to the jurisdiction.

Part 12 – Anti-Competitive Practices

34. The company participates in a relatively intense competitive relevant market which the Office continuously monitors and intervenes on a relatively frequent basis. This is consistent with newly introduced competition in traditionally monopolistic markets. The Company being an SMP holder, its actions are and will continue to be closely scrutinized on the basis that the principles of the Office mandate is to protect 'Competition' and not 'competitors in the market'.
35. The review carefully took into consideration the principles to be considered as set out under Part 8, recognizing both the Company and the Purchaser are in strong financial position to abuse their dominance and strategic placement in the market, to the detriment of competition. The acquisition is poised to provide meaningful benefit to consumers, but the potential for these benefits being realized in the short to medium term, then degrading over the long cannot be ruled out. The Office accepts that FGHL and HGL are not current horizontal competitors in relation to competing products, and that there are therefore unlikely to be horizontal competition. However, the Office has concerns that the

transaction may give rise to vertical competition concerns, as FGHL may have the ability and incentive to prohibit CGL selling propane through Foster stores post-transaction if CGL is desirous, or will only permit such sales on discriminatory terms, with consequent potential harm to competition and to consumers. The Office also has concerns that the transaction may give rise to conglomerate effects competition concerns, as FGHL may have the ability and incentive to tie or bundle propane and groceries sales together in a way that may harm competition in the propane market, with consequent harm to consumers. Moreover, the potential for violation of section 66 and 70 prohibitions are minimized through the Office current monitoring regime, which will be further enhanced with the comprehensive license framework and CPR in place during the second half of 2022. The Office therefore attaches certain conditions to its consent, conditions which are intended to remedy the Office's competition concerns.

36. The company and the transaction have not been assessed to pose any concerns to the requirements under this part, however the Office will continue to actively monitor performance in this area, will encourage the public and concerned parties to report potential violation, or will initiate own-motion investigations where breaches are suspected, and implement interim, ex-ante or ex-post measures to minimise the impact of anticompetitive and conduct which results in consumer harm.

Conditions

37. The Office, in making its decision regarding the transaction has three choices: 1) clear the transaction unconditionally; 2) block the transaction outright; 3) clear the transaction subject to conditions. As a general principle, competition (and regulatory) authorities do not block transactions where the entire transaction is not inherently anti-competitive without realistic possibility of remedy. The Office has not identified any impediment to imposing remedies, whether structural or behavioral, if the need arises to do so in the near term or in future. Accordingly, pending the result of the consultation, in granting its consent, the following conditions shall be imposed by the Office on the Company:
- a) The Office acknowledges that the Purchaser, in their capacity as the new owners of the Company shall honour all contracts in place by and between the Company and consumers, their affiliated companies and suppliers, their affiliated companies and consumers, existing suppliers and competitors, to the extent these arrangements do not violate any of the laws of the Cayman Islands.

- b) In order to avoid any violation or potential violation of section 66 and 70 prohibitions, the Company shall advise the Office of the terms and condition under which it has acquired businesses with consumption which is greater than 2000 USG per month. The requirement for these notifications and set threshold would be amended over time with a view to remove this obligation in the long term, subject to assessment of anti-competitive effects or potential for consumer harm.
- c) The introduction of promotion, product ties or bundling involving propane sales, bundled discounts involving propane sales, and enhanced marketing programs (together, “programs”) shall be notified to the Office before commencement, and shall not be introduced without the Office’s consent. To the extent that any of the foregoing initiative does not directly or indirectly involve propane, the Office’s approval or endorsement is not required. While the Office will undertake to review these initiatives where propane is involved to ensure, fair and orderly conduct in the propane market, the burden rests with the Company to demonstrate its behavior and conduct in the market are not anti-competitive.
- d) The Purchaser will commit to ensure their conduct in the market will not cause or result in any intended or unintended foreclosure of competitors, through its action which limits or constraints consumers from gaining access to the HGL’s current and future competitors, by restricting those channels to market by consumers.
- e) The Purchaser shall maintain separate accounts for the Company so as to prevent cross-subsidisation of propane and the Purchaser’s trade under its affiliated companies. To the extent practical, the Company shall demonstrate arm’s length dealing with the other affiliated businesses of the Purchaser as a strict regulatory requirement, and shall comply with the regulatory accounting rules established by the Office, which may be revised from time to time.

Office’s Determination

38. Pending the result of the consultation, in accordance with the provisions of Part 8 of the URCA, the Office grants its consent, as set out above and subject to the provisions of the Sale and Purchase Agreement executed by and between the parties dated 23 March 2022.

END

Appendix 1 – OfReg Sample Preliminary Merger & Acquisition Analysis Template

CONFIDENTIAL

OFREG FUELS

DRAFT MERGER ANALYSIS TEMPLATE

APPLICANT NAME: Foster Group Holdings Ltd. via Attorneys – Appleby Cayman

DESCRIPTION: ACQUISITION OF ENTIRE ISSUED SHARED CAPITAL OF HOME GAS LTD.

CLASSIFICATION: SHARE SALE AND CHANGE OF CONTROL

RELEVANT LAW: UTILITY REGULATION AND COMPETITION ACT
FUEL MARKET REGULATION ACT.

APPLICATION DETAILS

Date of Request:	28 March 2022
Brief Overview:	Bodden Holdings Ltd has entered agreement to sell 100% issued share capital of its subsidiary Home Gas Ltd to Foster Group Holdings Ltd.
OfReg's Acknowledgement Date:	29 March 2022
Preliminary Assessment Comments:	
Immediate Items for Considerations:	Immediate short-term impact on competition in Propane market and measures if any to mitigate degradation of competition and increase consumer harm. This has been assessed as very low risk based on preliminary assessment.

SITE PROFILE

Date Site Opened or Operations Commenced:	
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<i>Network/Brand:</i>	
<i>Site Ownership:</i>	
<i>Trade & Business License Category:</i>	
<i>Throughput:</i>	
<i>Forecourt Offering:</i>	N/A
<i>Products:</i>	<i>Propane</i>
<i>Service Offering Arrangement</i>	Mixed at Wholesale and Retail levels.
<i>District/Trading Area:</i>	George Town, Grand Cayman Satellite Operation – Creek, Cayman Brac.
<i>Planning Zone:</i>	Residencial/Commercial Area
<i>Direct Competitor(s):</i>	
<i>General Site Description:</i> <ul style="list-style-type: none"> • <i>Location Profile (Off Main Road, On/Off Highway, Four-way Traffic controlled junction, minor street, near schools, hospital</i> • <i>Site Attractiveness: Subjective Description in terms of appearance, night lighting, site appeal; unique feature of site (Cobranded location)</i> 	
<i>Environmental:</i> <i>Sensitive Receptors within 1000 Ft Radius, Equipment Type/Age, historical environmental issues, worst actors, UST System (pressure/Suction)</i>	
<i>Loyalty or Marketing Programs:</i>	
<i>Fleet Programs:</i>	
<i>Tenure with existing Supplier(s):</i>	
<i>Supplier's Incentive Programs:</i> <i>(List and details to be provided separately)</i>	
<i>Site Compliance Matrix:</i> <i>(General Compliance with DS Law in last two years)</i>	

Non-Fuel Operations/Services:	
Full convenience store, branded, royalties, tire shops, Courier/Pay services, ATM, Deli, Air, Water	

OTHER PORTFOLIO BUSINESSES RELATED TO SITE OPERATIONS

ECONOMIC ANALYSIS

The following sets out an inexhaustive list of items to be covered under the economic analysis of mergers and acquisition applications by the Office.

1. Market Share by Product:
2. Market Share by Brand
3. Relevant Market(s): LPG market in Grand Cayman, Cayman Brac and Little Cayman
4. Market Share within relevant market*
5. Market Share by Total Imports/Consumption by product
6. Market Concentration: (HHI)*
7. Differential to Single Dominance Threshold*
8. Average Annual Margins by Products:
9. Financial Terms for Fuel Purchases; Credit, cash purchases
10. Customer Financial Profile: % Credit customers on Forecourt
11. Frequency and average purchase quantities by product
12. Inventory accounting
13. Average total expenses and revenues
14. Statutory Costs/expense per gallon fuel per annum
15. Estimated Average annual direct Cost (expense) per unit gallon of fuel
16. Estimated Threshold Pricing level (approximate range) to establish predatory pricing
17. Average annual maintenance Cost
18. Average annual capital cost
19. Average annual depreciation
20. How is business financed/Access to financing?
21. Average Pricing relevant to sites in trading area/District
22. Average pricing relevant to immediate competitor(s)
23. Average pricing relevant to other sites within brand
24. Average pricing relevant to entire network (normalize where necessary)
25. Profitability Analysis

RISK PROFILE

SWOT, PORTER's FIVE FORCES MODELING; PESTLE

IDENTIFIED SYNERGIES

Affiliated Businesses related/unrelated to the sector/markets

EXTERNALITIES:

Prior and post-merger externalities relevant to competition and safety considerations.

Impact on National Energy Policy Goals & Milestones:

How will merger/acquisition support achievement of NEP goals in fuel sector.

Legal Considerations

OfReg Legal Team merger/acquisition considerations.

Consideration is given to develop a matrix to aid in the decision-making process (weighed inputs which provide a ranked approval indicative output).

END.